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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

BRIEF FOR RESPONDENT.

The writ of certiorari was granted in this case April 11, 1938, and we were at that time advised by the Clerk that the case would be reached for argument at the end of April. It is, therefore, not possible for us to delay the preparation of this brief until after it would be possible for the petitioner's counsel to serve their brief upon us. In that situation it is not possible to include in this brief any reference to the statement of facts that may be included in the brief of petitioner. After we are served with petitioner's brief, should we determine to present any statement relative to petitioner's statement of facts, we

will request permission to file a supplemental brief for that purpose.

Necessarily, also, we must assume in the preparation of this brief that the argument for the petitioner will proceed along the general lines of the argument in the lower courts, and on the points outlined in the petition for a writ of certiorari.

Broadly, the problems in this case may be divided into (1) the fundamental question of whether the Federal Amusements Tax can be levied on the admissions to the athletic contests held by the State agency and whether such State agency can be forced to collect the tax which will be dealt with in Part 1 of the brief; and (2) procedural questions which will be dealt with in Part 2.

Part One.

The Effort to Enforce the Tax Against the State Agency Cannot be Sustained.

It is not necessary to consume time or space in discussing the proposition that state and federal governments are each immune from taxation by the other, and that this immunity extends to the agencies of each performing governmental functions. The immunity of federal agencies was established in *McCullough* v. *Maryland,* 4 Wheat, 316. The immunity of state agencies was established in *Collector* v. *Day,* 11 Wall, 113. From then on through the latest decisions of this Court the fundamental principle has never been questioned. The principle is implied from the independence of the national and state governments within their respective spheres. It applies just as much to the states as it does to the national government, since "the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." (*Texas* v. *White,* 7 Wall, 700.)

Starting with this basic proposition, the decisions of this Court have developed certain additional rules that are here applicable. It is admitted that the immunity applies only to those state activities which are governmental in character, and not to those that are merely commercial. For example, when South Carolina determined to conduct the sale of intoxicating liquors as a state activity, such transactions, not being governmental in their nature, were subject to Federal taxation. (*State of South Carolina* v. *United States*, 199 U. S. 437.)

The first question therefore on the merits of this case is whether the activity here involved is governmental in its nature, or merely a commercial venture on the part of the State of Georgia.

The second inquiry on the merits arises out of the rule that in order for the claim of immunity to be sustained the imposition must bear directly on the state or on a state activity. The question here has usually arisen where some private interest has claimed immunity from some Federal levy because it was connected in some way with transactions between the private interest and the state. As will appear more fully in the discussion, late cases from this Court have definitely limited the extent to which private interests may thus claim immunity from Federal taxation where such tax is only indirectly or remotely connected with state activity. The second question here then would be: Assuming that it can be shown that the holding of such athletic contests is a governmental function, does the tax bear directly on the performance of such function or does the requirement that a state agency shall collect the tax constitute a burden upon the state?

The syllabus of the argument to be here presented is as follows:

1. Regents of the University System of Georgia is a public instrumentality of the State government, carry-

ing out a part of the State's program of public education.

2. Public education is a governmental function.

3. The holding of athletic contests is an integral part of the program of public education conducted by the State of Georgia.

4. The majority of educators regard athletic contests as a sound part of a program of education.

5. The means by which the State carries out its program of public education are in all respects for determination by the State authorities, and their determination is not subject to review by any branch of the Federal government.

6. State activity does not cease to be governmental because it produces some income.

7. The tax is imposed directly on the State activity and directly burdens that activity. The burden of collecting the tax is imposed immediately on a State agency.

1.

Regents of University System a Public Instrumentality of the State Government.

The status of Regents of the University System of Georgia is a matter of law settled by the statutes of that State. It is a public governmental corporation created by law in 1785 under the name of "Trustees of the University of Georgia." The name was changed in 1931, but the present public educational corporation is the same entity which has existed continuously since its creation by the Act of 1785.

The act here referred to is found in Marbury and Crawford's Digest, beginning at page 560, and also in Watkins'

Digest, beginning at page 299. It is entitled "An act for the more full and complete establishment of a public seat of learning in this State." The use of the word "more" is explained by the fact that while no institution had been specifically created before the Act of 1785 there had been earlier legislation setting aside public lands for the purpose of having them disposed of and a public institution of learning created. (See *Marbury and Crawford Digest*, p. 132, where the Act of 1783 is published, and *Watkins' Digest*, p. 290, where the Act of 1784 is published; both of which provide for setting aside public lands for higher education.)

The Act of 1785 provided for the creation of the Trustees of the University of Georgia; and provided in the 3rd section—"they are hereby constituted a body corporate and politic by the name of Trustees of the University of Georgia, by which they shall have perpetual succession," etc.

It is, of course, a matter of general history that in 1785 public school systems were wholly unknown. It seems to have been the contemplation of those creating the University at that time that all public education, including the kind we now refer to as the common schools, would be under the Trustees of the University of Georgia. The Fourteenth Section of the Act is as follows:

> "All public schools instituted, or to be supported by funds or public moneys in this State shall be considered as parts or members of the University and shall be under the foregoing directions and regulations."

It is also a matter of history that when common schools were established in Georgia this original purpose of placing them under the control of the University of Georgia was not followed; but whenever any other public institution for higher education was created in that State it was established as a branch of the University of Georgia, although

up to the year 1931 the different branches were under separate boards of Trustees. The only branch with which we are interested in the present case is the Georgia School of Technology. This was created as a branch of the University of Georgia by the Act of October 13, 1885, published in Acts of 1884-85, p. 69.

In 1931 the State of Georgia passed an act for the general reorganization of the State government which is commonly known as the Reorganization Act (Acts 1931, p. 7). The portion of that act dealing with the reorganization of higher educational institutions in the State is printed in the Code of 1933, Title 32, Chapter 1. All separate boards of trustees for different branches of the University System were abolished and the management, government, and control of all state institutions of higher education in Georgia was vested in the Board of Regents of the University System of Georgia. By § 32-101 of the Code this Board was "constituted a department of the State government of Georgia." By the same section "the name of the corporation heretofore established and existing under the name and style 'Trustees of the University of Georgia' is hereby changed to 'Regents of the University System of Georgia.'"

By § 32-102 it was provided that "the university system of Georgia shall consist of the University of Georgia and all of its branches."

§ 32-103 lists the branches of the university system in existence when the reorganization act of 1931 was passed. It should be noted, however, that under authority given to the Board of Regents by § 32-116, § 32-124, and § 32-126, to discontinue institutions and reorganize the system, drastic reoganizations were made. This reorganization is set out in the editorial note following § 32-103 and is not repeated here. Its only materiality on the present case is in the fact that the Georgia School of Technology of Atlanta was continued as one of the institutions in the university system.

Under § 32-104 the members of the Board of Regents are appointed by the Governor and confirmed by the Senate. Their terms of office are fixed by law in § 32-105.

Then follow sections relating to the officers of the board, its meetings, etc.; all of which are fixed by law. It is not material to recite these matters in detail. It is important, however, to bear in mind that the whole subject is regulated by State statutes.

The Act of 1933 (Acts 1933, p. 62) granted to the Board of Regents power "to consolidate, suspend, and/or discontinue, institutions; merge departments, inaugurate or discontinue courses and abolish or add degrees." It was under this authority that the reorganization above referred to was effected.

Another act of the same year (Acts 1933, p. 61) gave to the Board of Regents power to reallocate and distribute all appropriations made for the support of the university system or any of its branches.

In 1935 the General Assembly passed an act "to define the status of the Regents of the University System and the members of the Board of Regents of the University System; to declare the State's title and ownership of the property held by the Regents of the University System," etc. (Acts 1935, p. 177).

It is apparent from the language of the act and from the history of the subject matter that it was in the main merely declaratory of a legal status that already existed. The first section provides that the corporation mentioned in § 32-101 of the Code "and known as 'Regents of the University System of Georgia' is hereby declared to be a governmental agency of the State of Georgia, and all property held by said corporation under said act of August 25, 1931, as embodied in Title 32 of the Code of Georgia of 1933, is hereby declared to be the property of the State of Georgia. * * * The members of the Board of Regents of the University System

of Georgia, as provided by said act, are hereby declared to be public officers of the State of Georgia," etc.

We believe it apparent that this is merely a statement of what already existed under the law of this State. Indeed, it is apparent from the language of the act that it is intended to be in this respect declaratory of an existing status. As heretofore pointed out, the Board of Regents had already been declared to be a department of the State government of Georgia. Its members were necessarily public officers of the State of Georgia, and the title to the property, while in a body corporate under Georgia law, was necessarily held for the State of Georgia, to which its ultimate ownership belonged.

§ 3 of the Act of 1935 relates to the method of handling fees and other revenue of the different institutions including "proceeds of athletic contests" and ends with the statement that "all such revenue is declared to be under the control of the Board of Regents, which control may be exercised directly or through such athletic associations or organizations as it may authorize, provided such associations and organizations remain always subject to the control of the Board of Regents."

No change in the existing status was made by this provision. The control of the Board of Regents in the respect indicated was plenary under previous laws and was not questioned. The provision last quoted, however, is important in one respect, namely, as embodying a legislative approval of the policy theretofore followed by the Board of Regents of handling the management of athletic contests, in some respects at least, through the medium or agency of athletic associations.

A complete and detailed review of the whole history of the university system of Georgia up to the year 1927 is found in the reports of the Georgia Bar Association for that year,

commencing on p. 256, in an address by Chief Justice Richard B. Russell, under the title "The Legal History of the University of Georgia."

In *State of Georgia* v. *Regents, etc.*, 179 Ga. 210, the court on page 218 says:

> "It is thus seen that the Regents of the University System of Georgia is a distinct corporate entity, though controlled by a 'Board of Regents *which is designated as a department of the State government.*'" (Italics by us.)

Again on page 218 the court says:

> "The Legislature does not pretend to govern the system, but has intrusted this responsibility to the Board of Regents."

On p. 219 the court says:

> "It may be conceded that *the State is the equitable and beneficial owner of all property now vested in the Regents of the University System,* and that the corporation by that name is the holder only of the legal title." (Italics by us.)

The use of a separate corporate entity created by statute as a mere instrumentality of government is certainly not a strange thing at the present date. The Federal Government uses many such corporate agencies which are uniformly exempt from State taxation, except where the Federal Government itself has consented to such taxation. As illustrations of this we mention:

National Banks,
Federal Reserve Banks,
Reconstruction Finance Corporation,
Federal Intermediate Credit Banks,
Home Owners Loan Corporation,
Commodity Credit Corporation,

Electric Home & Farm Authority,
Export-Import Bank of Washington,
Federal Land Banks,
Production Credit Corporation,
Banks for Cooperatives,
Federal Deposit Insurance Corporation,
Federal Savings & Loan Insurance Corporation,
The Tennessee Valley Authority,
Textile Foundation, Inc.,
War Finance Corporation.

In its opinion in this case the Circuit Court of Appeals, after referring to the Act of 1785 chartering "Trustees of the University System of Georgia" now, as pointed out, "Regents of the University System of Georgia", says:

> "The University of Georgia as a seat of higher learning with branches in many parts of the State has remained imbedded in the Constitution and the statutes of the State ever since. The State of Georgia thus came into the Federal Union with this University declared as a part of its governmental activity."

Later the court says:

> "That the Regents are public officers and the funds they raise are public moneys, and specifically those raised by the athletic associations such as are here involved, was emphatically declared by the Legislature in the Act of 1935. Acts 1935, page 171. There can be no doubt that the Board of Regents and the instrumentalities which they employ, including the athletic associations, are governmental agencies of education."

2.

Public Education is a Governmental Function.

We believe this proposition to be self-evident and that the attempted distinction in this respect, that higher edu-

cation is not a governmental function, is not of sufficient weight to justify discussion. With reference to it, the Circuit Court of Appeals said (R. 434):

> "There is a faint contention made here that higher education is not a legitimate governmental function, though common schools are admitted to be necessary to the success of a democracy. It is true that historically higher education in America was for a long period furnished by church seminaries and privately endowed and operated colleges; but this was due to the lack of public funds and not to a failure to recognize that highly educated leaders are also necessary to the success of democracy. George Washington himself urged and sought to found a college for higher education in Virginia, and Thomas Jefferson pushed the idea to fruition in Virginia's University. Even before this, Georgians were pressing the matter."

3.

The Holding of Athletic Contests Integral Part of Program of Education by the State.

The Circuit Court of Appeals in this case has held that the above proposition is clearly established by the facts in this case (R. 436). Under this division of the brief we wish to point out the facts shown by the record in this respect. As to them, there is absolutely no conflict. We are not at this point concerned with whether the State of Georgia should have included athletic contests in its educational program. At another point of the brief we will endeavor to show that the inclusion of such contests in a program of education is in accord with the views of most educators of standing in this country. We will also at another part of the brief endeavor to show that whether Georgia should include such matters in its educational program is wholly for the decision of the State authorities.

At this particular point, however, we narrow the discussion to the facts in this record with a view of showing that beyond any doubt in actual fact the responsible authorities of the State of Georgia have in fact consistently taken such action; and that as to this there is no dispute.

The opposing argument seems to be centered around two ideas: One, that since inter-collegiate football contests have in some instances produced large revenue, the State of Georgia must be considered as holding those contests for the purpose of revenue only; and, Two, a relatively small percentage of the college students participate in inter-collegiate football games. Both of these arguments overlook the fact that inter-collegiate football games are merely a part of an entire program which uses athletic contests as a part of the program. They also overlook the fact that it is only in relatively late years that inter-collegiate football has been a source of revenue but that for many years these games were held by the State authorities when they were not even self-supporting. Certain of the facts are summarized by the Circuit Court of Appeals in its opinion as follows (R. 436):

> "That the Board of Regents have both at the University at Athens and the Technological School at Atlanta made physical education an integral part of the University's function, and that they authorize and supervise public exhibitions for which admission is charged as a part of the program admits of no doubt. The formal catalogues and bulletins of both institutions set forth at length the opportunities and the requirements for physical education. At Athens all students, male and female, are required to take two years of such education, military drill for males being recognized as equivalent. One teaching degree includes sports in its curriculum, being designated to qualify graduates not only to teach in the State High Schools but to direct the physical education in such

schools. In both institutions the head of the Department of Physical Education holds the office of Dean of Men in the faculty. Other instructors, often called 'coaches', are also members of the faculty. The conduct of athletic contests and the qualifications of contestants are regulated by faculty rules approved by the Regents and are related to scholastic standing. The schedule of contests for each year is approved by the faculty and by the Regents. Their details are handled at each institution by an Athletic Association composed of faculty members and alumni and incorporated to facilitate such business transactions as the improvement of the athletic grounds and equipment. They are wholly under control of the Regents and are their agents. The Chancellor of the University System is himself president of the Athletic Association at Athens. The taxes here in question were assessed against these associations, and the pleadings of the Collector insist that the associations are to be considered separate from the Regents of the University System, but that position is untenable and has been abandoned in argument. The tickets which gave rise to the tax show on their face that they were sold for the University for they state that the University of Georgia contends that there is no liability to the tax, but the University is collecting the fourteen cents as a part of the charge of admission and will retain it as such if a tax is not collectible. The money from admissions is, like all other funds of the associations, audited by the State Auditor, and as already stated was claimed specifically as the State's by the State Legislature itself in the Act of 1935. The highest State governmental authority has thus ratified the use of the associations and the charge for admissions to the games as proper functions of the University."

No one makes a profit out of athletics at either institution. Salaries, of course, are paid to coaches, trainers, doctors, and the like, but they are fixed and reasonable. No percentages of any kind are allowed (R. 181).

Football is only one of the inter-collegiate contests. Such contests with other colleges are held also in base ball, soft ball, track, tennis, swimming, polo, basket ball, golf and boxing. An admission is charged to all of these contests and if the admission exceeded Forty (40¢) cents they would all be subject to Federal taxation. At the University of Georgia almost one-third of the student body participate in some form of inter-collegiate contests (R. 162). Looking only to football, there are from 135 to 160 men at the University of Georgia who participate in the football squad, either as members of the team or those seeking such membership and thus receiving the benefit of the training involved (R. 173). There are no figures in the record as to how many students take Greek as an example for comparison, but we believe it to be a fair guess to say that it would be a smaller figure which would not, we think, prevent Greek being considered an educational function. Also, intra-mural contests must be considered. These are athletic contests and admissions are charged or can be charged for spectators at such intra-mural contests. If these admissions exceed Forty (40¢) Cents per ticket they would be subject to a Federal Amusement Tax and if the principle of the tax should be sustained it would be within the power of the Federal Government to tax them, regardless of the price at which the admissions were sold. At the University of Georgia three-fourths of the student-body participate in intra-mural athletic contests of some kind (R. 162), and at the Georgia School of Technology eighty (80%) per cent of the students participate in some form of athletic contest (R. 199).

A fair view, therefore, of inter-collegiate football games must look upon them as a part of the general program to stimulate general participation in athletic contests of one kind or another and which succeeds to the extent of three-fourths or more of the student-body.

It is true that at the present time these football contests produce a large revenue, but this has not always been true. Inter-collegiate football was, as pointed out, carried on for many years when it was not even self-supporting and when it could not have been conducted at all except for the receipts from base ball contests (R. 233). The situation has now changed: Baseball contests do not attract crowds at the present time but football contests do so that at the present instead of football contests being supported by the receipts of other forms of athletic activities, now the receipts from football are what enable the State authorities to continue the other parts of the athletic program (R. 233).

Surely the fact that the public now attends these contests in larger numbers than formerly can not have the effect of taking them out of the program of physical education, in which they were started and conducted for many years at a loss, and changing them into mere commercial activities. Any such theory would lead to ridiculous results. It would lead to the conclusion that inter-collegiate baseball was not a part of the program of physical education when it was paying large returns because of its general popularity but that the same inter-collegiate sport had become a part of the program of physical education when the public ceased to patronize it largely and it was continued at a loss. Track, basketball, boxing, swimming, etc., now conducted at a loss, would be regarded as parts of a program of physical education but whenever the popularity of one of these sports increased with the public it would, under the Government's theory, cease to be a part of the program of education and become a commercial venture.

On the same theory let us look a little more closely at the status of football contests. During the many years that they were conducted at a loss they would be regarded as a part of the program of physical education but would, according to the Government, have lost their status since the reve-

nue from them had grown; but, at just what point would this change occur? Would it occur at the exact point when the revenue exceeded the expenses? Or would some definite figure or percentage have to be reached before the character of the activity was changed into a mere commercial venture?

All of this, of course, means that the record in this case shows conclusively that inter-collegiate football contests must be looked at in the light of their history and as a part of an entire program and that when so looked at their status has not been changed by reason of the fact that in late years public attendance at them has greatly increased.

It should be admitted readily that this large increase in attendance has raised serious problems with which educational authorities must deal. In another division of this brief views of educators on this point are referred to. The Circuit Court of Appeals in this case has pointed out the danger inherent in such a situation (R. 437). It is also pointed out that this increased popularity has led in some instances to an abuse of scholarships amounting in effect to hiring players (R. 438). All students of education recognize such dangers and the possibility of such abuses. It is conceivable that they might go into such an extent in a given instance as to justify the Court in holding that such athletic contests had degenerated into mere commercial ventures. It is important to point out here, therefore, that with reference to this the Circuit Court of Appeals says:

> *"There can be no such charge made against the Management of the Regents as exhibited in this record."*

The facts on which this finding is based should be stated a little more fully. Counsel representing the Government undertook in the trial of this case to inquire into the extent to which scholarship aid of any kind was received by students participating in inter-collegiate football. Whenever such question is raised the only possible course to pursue

is to give completely, fully and exhaustively the entire facts on the subject, and this we have endeavored to do in this record.

The regulations for the guidance of undergraduate students at the University of Georgia cover the question of the eligibility of students from the standpoint of scholarship, etc., to participate in these contests (R. 248). The whole matter is, in fact, regulated in the first instance by the Conference Rules of the Southeastern Conference which are published as a part of this student guide and made binding by the University faculty (R. 249). Under these regulations, both of the conference and of the University, no student can participate in an inter-collegiate sport who does not meet the scholastic and attendance requirements or receives any gift or remuneration other than a scholarship or a loan through the Faculty Committee (R. 250). A pledge of compliance with these rules is required (R. 251). The catalog of the University, under the heading "Department of Physical Education" lists the various coaches as members of the faculty (R. 251), and repeats the requirements set out in the Guide for Undergraduates (R. 260, 261 and 262).

The situation is substantially the same at the Georgia School of Technology (R. 283, *et seq*).

At the University of Georgia scholarship and student aid of one kind or another is furnished to in excess of Nine Hundred (900) students attending the University (R. 229). Notwithstanding the fact that the football squad, as heretofore pointed out, consists of from 135 to 160 students, there were only between 20 to 30 of that group who received scholarship aid of any kind (R. 242). While we have been unable to find the total enrolment of the University in the record, there is certainly no reason to suppose from the above figures that the percentage of the football squad

who received scholarship aid was any larger than the percentage of the entire student body.

The situation is substantially the same at the Georgia School of Technology. Between 18 and 20 students who played football received scholarship aid of some kind and about 275 who did not play football received scholarship aid (R. 213).

We have heretofore pointed out that all scholarship aid is given through, and only through, a committee of the faculty. No boy receives any money, whether an athlete or not, but may receive board, tuition, room rent—all, or any one of them. This is true of students who do not play football as well as of students who do (R. 212 and 238). No inducement is offered to football players, except in some instances scholarships or loans, as stated above, just as are offered to other students.

The Southeastern Conference permits faculties to allow scholarship aid to athletes on the same basis as other students but not otherwise, following in this respect substantially the Cecil Rhodes Plan (R. 243, 244).

We summarize this aspect of the matter as follows: No athlete at either institution receives any inducement of any kind except such scholarship or loan aid as may be extended to him through the faculty committee administering funds for student aid. No part of these funds is limited to those students who are inter-collegiate athletes. It does not appear that those athletes who receive scholarships are in any larger percentage than other classes of students or that they get any benefit disproportionate to other students who also receive scholarship aid. All of this is wholly undisputed. There is not a word in the record indicating that these requirements are evaded in any way or that any subterfuge is resorted to. The finding of the Circuit Court of Appeals therefore that the Board of Regents is subject

to no possible criticism under the record in these respects is abundantly sustained.

In the Circuit Court of Appeals opposing counsel pressed the view that the whole athletic program could not be regarded as an educational activity because at the Georgia School of Technology no credit was given toward a degree for participation in any part of the program, and at the University of Georgia the credits that may thus be gained are very limited. If it is to be said that no activity at a State institution is to be regarded as truly educational unless credit is given toward a degree, then we would be forced to say that literary societies, class debates, inter-collegiate debates, art associations, student publications, dramatic clubs, religious welfare societies and the vast body of extra curricula activities are not educational. As a matter of fact, no one would seriously claim this. Able educators regard these extra curricula activities as a most important part of the education of the boys and girls. It is true that the Federal Government has not as yet attempted to tax any of these things and probably will not attempt to tax them, but the point is that if the position of opposing counsel is correct that failure to give credit toward graduation is the test, then all these other activities are non-educational and could be taxed. There is no special distinction as to football.

In the Circuit Court of Appeals it was also suggested that inter-collegiate athletics should not be regarded as a part of an educational program because physical training could be given adequately and less expensively by calisthenics and the like. The picture of education in a college world which is thus disclosed is one where the student studies hard in classes, takes calisthenics for his physical development, and confines his interests within these limits. Any modern educator would regard such a picture as medieval. Youthful interests never have been confined within

such bounds and never will be. Modern educators would say without hesitation that such confinement would be unfortunate if it could be accomplished. Life itself is the best educator. Hence, American colleges today try to control and direct the extra curricula life of the college community along lines of educational value. As hereinafter pointed out, the most important consideration here is the inculcation of those social attitudes which are most desirable in after life. This extra curricula training of the college community includes all of those activities which are stimulated and directed by the responsible authorities and directed toward educational ends. This training includes literary societies, debates, glee clubs, dramatic clubs, college publications, religious organizations, athletics and sports of all kinds, both inter-collegiate and intramural and many others. To appreciate the true value of college sports from an educational standpoint they must be considered as merely a part of an entire program, but none the less an integral and important part of high and recognized educational importance.

It should be noted finally on this point that the Board of Regents which, as heretofore pointed out, is a department of the State Government, has approved the entire program of physical education (R. 225), and that, as pointed out, the Act of 1935 is a clear approval of the same by the General Assembly of the State. The whole situation on the point can be summarized by saying that the evidence shows without dispute that the responsible governmental authorities of the State of Georgia are in fact and in good faith in each of these two institutions of the State of Georgia using inter-collegiate contests as an integral part of a program of education.

The cases in this country which have considered whether athletic contests held by State Governmental Institutions are themselves governmental functions have uniformly an-

swered the question in the affirmative. *Mokovich* v. *Independent School District of Virginia,* 225 N. W. 292 (Minn.), considered whether a school district could be sued for injuries received by a student in an interscholastic football game at which admissions were charged. It was held that such game was part of the program of public education; was a governmental function; and therefore, no liability existed.

The following cases have emphasized the fact that physical education, the maintenance of fields for athletic contests, and the like, are integral parts of an educational program:

German Gymnastic Ass'n v. *Louisville,* 117 Ky. 958; 80 S. W. 201;

from which the following is quoted:

> "Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiment. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to a perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the state as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. In *Mt. Herman Boys' School* v. *Gill,* 145 Mass. 146; 13 N. E. 354, the court said: 'Education may be particularly directed to either the mental, moral or physical

> powers and faculties, but in its broadest and best sense it relates to them all.' In *Huohs* v. *Backer,* 6 Heisk, 395; 19 Am. Rep. 398, the court said: 'In its broadest sense, the word "education" comprehends, not merely the instruction received at school or college, but the whole course of training, moral, intellectual and physical.' "

In the cited case the Court of Appeals of Kentucky held the Athletic Association involved to be exempt from taxation, being an educational institution.

Reiger v. *The Board of Education of Springfield,* 287 Ill. 590, 122 N. E. 838, at p. 839:

> "It could not very well be contended that a modern public school of the character described in the bill, in a city of the size of Springfield, ought not to have suitable playgrounds and athletic fields for pupils. Such a necessity is now generally recognized by all school authorities in order to obtain the best mental training and development."

The Supreme Court of Washington has ruled to the same effect: *State ex rel. School Dist. No. 56, Chelan County* v. *Superior Court of Chelan County et al.* (Sup. Ct. of Washington), 124 Pac. 484, 69 Wash. 189:

> "Since the physical development of a child attending school cannot be had without a suitable place for recreation and exercise, the condemnation of land adjacent to a school building for an athletic and play ground is a taking for public use. • • •
>
> "Finally, it is urged that the use for which the land is sought to be taken is not a public use. It is contended that the land is sought rather as a playground for the pupils attending the school than for strictly school purposes. The testimony of the superintendent of the school from which we have hereinbefore cited undoubtedly lends color to this contention, but nevertheless we think the use for which the land is sought to be taken is

a public use. The physical development of a child is as essential to his well-being as is his mental development, and physical development cannot be had without suitable places for recreation and exercise. To acquire such grounds is therefore within the province of the public schools."

Similarly, the Supreme Court of North Dakota has ruled: *Anderson* v. *Board of Education* (Sup. Ct. of North Dakota), 190 N.W. 807, at p. 809, 49 N.D. 181:

"Subdivision 4 of section 18 of the act confers upon the board of education power to purchase all the needful supplies for the schools and all apparatus, furniture, and appendages. This power is broad enough to authorize the board to purchase all needful supplies for use in maintaining the health of the pupils and for their proper physical development. It may provide for apparatus to be used in manual training which develops the intellect and skill of the pupil, and as well contributes to his physical improvement. *So likewise may apparatus be provided for track or football or basketball,* and for smaller pupils, swings, teeter boards, and such other apparatus may be provided, all designed to improve the pupil in some respect. All such apparatus and much more not necessary here to mention the board is authorized to provide for use in the schools. All such apparatus is considered approximately as much a part of the needful supplies of schools as are the desks or other needful furniture. It constitutes a necessary part and portion of the school system. The school would not be kept in needful supplies, unless such were a part of them. Hence, when the board of education provides them, it is acting in a purely governmental capacity. In reality it is a part of the principal duties of the board to provide such needful and necessary apparatus." (Italics ours.)

Likewise, in *Spencer* v. *School District No. 1,* 254 Pac. 357, 121 Ore. 511, the Supreme Court of Oregon held that the maintenance of a gymnasium for use of students was the

performance of an essential governmental function, for which the defendant was immune from an action for damages for negligence.

In the next division of this brief, we point out that the use of such contests as a part of the program of Education is approved by the best educational thought in this country. We believe that the opinions of educators of recognized authority are valuable for consideration by the Court at this point. Not that it is necessary for the Court to determine whether these educators are correct in their views. That determination as we will later point out, so far as it relates to the public institutions of the State of Georgia, is one to be made by the responsible authorities of that State. When, however, we assert that those State authorities have in good faith determined to use athletic contests as a part of a general educational program it is helpful in considering whether that determination is in good faith or is a mere pretense or subterfuge to know what educators, generally, think on this subject.

4.

Educators Regard Athletic Contests as Sound Part of Program of Physical Education.

Since the discussion of this subject, involving the current thought and expressions of leading educators, requires considerable quotations and excerpts from books and articles, we have set out this discussion in the appendix to this brief, to which the Court's attention is directed.

5.

The Means by Which the State Carries Out its Program of Education are for Determination of State Authorities, Not Subject to Review by Federal Government.

The above proposition we believe to be controlling in the present case. We have seen that the State of Georgia is in

fact using these intercollegiate sports as an integral part of its program of public education. We have pointed out that there is no possibility of saying that such use either originated as a commercial venture or is used as a mere commercial venture. There is no basis for claiming that the action of the State authorities in using such contests in its program of education is a mere pretense or subterfuge. We have seen, furthermore, that the view reached by the State of Georgia through its responsible authorities as to the suitability of such athletic contests in a program of physical education is in accord with the views of a large majority of students of education in this country.

We therefore say: *The determination of the State authorities to include these contests in the State's program of education is in all respects binding on the Federal Government.* They must be treated as a part of the State's program of public education.

The foregoing inevitably results from the relation between the Federal Government and the State Governments under our constitutional structure. "So long as our present dual form of Government endures, the States, it must never be forgotten, are as independent of the general Government as that Government within its sphere is independent of the States." *Bush* v. *Commissioner Internal Revenue,* 300 U. S. 352, 364, citing *Collector* v. *Day,* 11 Wall. 113; *Texas* v. *White,* 7 Wall. 700.

It is not too much to say that the proposition reaches the very core of our constitutional structure; nor is it too much to say that it is controlling on the merits of this case.

In *U. S.* v. *Baltimore & Ohio Railroad Company,* 17 Wall. 322, this situation was presented: The City of Baltimore had loaned money to the Baltimore & Ohio Railroad Company to encourage the construction of the railroad. The Federal Government undertook to enforce a liability upon the B. &

O. Railroad to withhold at the source a Federal tax on the interest on the bonds of the railroad which had been issued to the City for the money thus loaned. Among other contentions made by the Federal Government was that the City had gone into a mere commercial venture and, therefore, since the loan was not made in the performance of a governmental function, it was subject to taxation. With regard to it the court says:

> "This was a question for the decision of the city under the authority of the state. It was a question to be decided solely with reference to public and municipal interests. The city had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The state could do these things by the direct act of its legislature, or it could empower the city to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the city. It might be wise, or it might prove otherwise. * * * The city had the power given it by the legislature to decide the question. It was within the scope of its municipal powers."

Smith v. *Kansas City Title & Trust Company*, 255 U. S. 180, is here a case of great importance. It was a suit in equity questioning the constitutionality of the bonds issued by a Federal Land Bank upon the ground that the Federal Government had exceeded its constitutional powers in instituting such land banks. It was alleged that they were mere commercial ventures and that the claim that the Government has established them as fiscal agencies of government was a mere pretense. The suit set out a strong showing as to the extent to which such land banks were engaged in general financial business and the attenuated connection they had with any fiscal purposes of the Federal Government. The court, however, declined to consider this attack

on the ground that Congress having power to establish fiscal agencies of government its determination of the means that were used in carrying out this function could not be questioned. The application here is clear: The State, having the power to carry out a program of public education, the means adopted by State authorities to this end likewise can not be questioned. We quote from the decision as follows:

> "But, it is urged, the attempt to create these federal agencies, and to make these banks agents and public depositaries of the government, is but a pretext. But nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482; *McCray* v. *United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 147, 153, 156, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 and cases cited."

In the *State of Arizona* v. *The State of California*, 283 U. S. 423, Arizona attempted to question the authority of the Federal Government to construct Boulder Dam, the basis of the attack being that the only asserted power for the construction was that of the Federal Government over navigable streams and that in point of fact it was a mere pretense that the construction was for navigation, it being alleged that the construction was for wholly other purposes not within the power of the Federal Government. The case is in point, though it did not involve State action, because as heretofore pointed out the States within their respective spheres are equally independent. In reference to this attack the court says:

> "The bill further alleges that the recital in said act that the purpose thereof is the improvement of navigation * * * is a mere subterfuge and false pretense.

It quotes a passage in article IV of the compact, to which the act is subject, which declares that: 'Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes;' and alleges that 'even if said river were navigable, the diversion, sale and delivery of water therefrom, as authorized in said act, would not improve but would destroy, its navigable capacity.'

"Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not inquire. *McCray* v. *United States,* 195 U. S. 27, 53-59, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Weber* v. *Freed,* 239 U. S. 325, 329, 330, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317; *Wilson* v. *New,* 243 U. S. 332, 358, 359, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *United States* v. *Doremus,* 249 U. S. 86, 93, 94, 39 S. Ct. 214, 63 L. Ed. 493; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, 187, 39 S. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161, 40 S. Ct. 106, 64 L. Ed. 194; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, 210, 41 S. Ct. 243, 65 L. Ed. 577. The act declares that the authority to construct the dam and reservoir is conferred, among other things, for the purpose of 'improving navigation and regulating the flow of the Colorado River.' As the river is navigable and the means which the act provides are not unrelated to the control of navigation, *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 419, 46 S. Ct. 144, 70 L. Ed. 339, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this court to determine."

In substance the same principle is briefly stated by the court in sustaining the Tennessee Valley Authority. *Ash-*

wander v. *Tennessee Valley Authority*, 297 U. S. 288. *See page 329.*

It is wholly inconsistent with the independence of a government within its own sphere to permit another government to question the determination of the means by which governmental programs are carried out. Within their respective spheres the states are treated as independent governments in this respect. If in the enforcement of its tax laws the Federal Government can question the selection of the means by which the states perform their governmental functions, then it would follow that the State governments in the enforcement of their tax laws could likewise question means by which the Federal Government carried out its governmental functions. It is fundamental here that the rights are reciprocal.

Any contrary rule would permit a State in an effort to tax national banks to force an inquiry as to whether they were really enterprises for private gain and not in reality used as fiscal agencies of the Government.

It would likewise permit a state, seeking to tax the Reconstruction Finance Corporation, to raise questions as to its commercial activities similar to those the court refused to permit raised as to the Federal Land Banks. Illustrations could be given as to many other corporations used as agencies of the Federal Government.

Of course the court would not permit a State to do anything of the kind. It should not be permitted. Any such action questioning the decision of the Federal Government as to the means it shall use in carrying out its governmental functions would be wholly inconsistent with the governmental powers it possesses in its constitutional sphere. It is clear that the means used by the State of Georgia in carrying out its program of public education are just as completely for the determination of the State authorities

alone and their decision, unless a mere pretext or subterfuge, must be taken as final.

It is equally true that only in the gravest and clearest cases would this Court hold that the action of responsible State authorities within the scope of their powers was a mere pretext or subterfuge. Ordinary rules of comity would require that every presumption of good faith should be indulged. For reasons indicated in another sub-division of the brief there is no possibility of questioning in this case the conclusion of the Circuit Court of Appeals that the State of Georgia through its authorized officials has in fact and in good faith adopted contests of this kind as an integral part of its program of public education.

6.

State Activity Does Not Cease to be Governmental Because it Produces Some Revenue.

This proposition can be disposed of briefly. It is not necessary to do more than to cite the decisions of this court:

People of State of New York v. *Graves,* 299 U. S. 401;
Bush v. *Commissioner,* 300 U. S. 352.

Other citations could be given but these are controlling.

The last case dealt with an effort to tax the salary of the chief engineer of the Bureau of Water Supply of New York. It was held that the tax could not be collected. Among other things, the court says:

> "If that service be governmental it does not become private because a charge is made for it or a profit realized."

As an illustration of this, the court refers to the function of public education, saying:

> "The state or the city may exact a tuition charge for instruction in the public schools; but thereby the

maintenance of the public schools does not cease to be a function of the government."

7.

The Tax is Directly on a State Activity and Directly Burdens that Activity. The Burden of Collecting the Tax is on the State Agency.

While the purchaser of the ticket is the taxpayer, nevertheless, the tax is imposed directly and immediately on the transaction conducted by the State, namely, the sale of the ticket or license to attend the athletic contest.

Late cases from this Court have reviewed fully the realm of law here applicable. They have restricted the extent to which private interests may claim an immunity from taxation because the transactions involved were to some extent connected with a State activity. In the immediate case, it is not a private interest but the State itself that is claiming the immunity; and what is even more controlling, the tax here involved is levied directly upon the State activity itself.

Throughout the entire line of decisions from this Court on this subject, including the latest expressions from the court, it has been uniformly declared that where the tax levy is directly on a State transaction it must be treated as burdening that transaction and hence invalid.

Osborn v. *Bank of the United States,* 9 Wheat. 738, involved a State privilege tax on the Bank of the United States which was held to be invalid. The details are not here material. The court says that the tax has the same effect as a tax on a contract of a governmental agency executed in performing a function of the government. And with regard to that the court adds:

> "We do not admit that the act of purchasing or conveying the articles purchased can be under State control."

In *Weston* v. *Charleston*, 2 Pet. 449, the court dealt with a city ordinance imposing a tax on all stock issued by the United States in retirement of its debts, which was held unconstitutional. We quote as follows:

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

In *Ambrosini* v. *United States*, 187 U. S. 1, the defendant had been convicted of a failure to affix stamps to a bond given by him to the State of Illinois as a condition for the issuance of a liquor license by the State. The conviction was reversed; the court holding that the bond was an essential part of the transaction in which the State granted the license and that the Federal Government could not impose a tax thereon. We quote as follows:

> "The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter. Nelson, J., *The Collector* v. *Day*, 11 Wall. 113, *sub nom. Buffington* v. *Day*, 20 L. Ed. 122."

Here the tax, though levied on the purchaser, is immediately on the State license to attend the contest.

In *Wheeler Lumber Bridge and Supply Co.* v. *United States*, 281 U. S. 572, the court sustained a Federal tax

of three per cent of the amount paid for the transportation of freight on a shipment of lumber sold to a county. The basis of the holding, however, is that the transportation of the lumber was a different matter from the sale itself. The distinction made by the court indicates clearly that a tax directly on the sale by the county could not have been sustained; the Court pointing out that the tax was "not laid on the sale nor because of the sale."

In *Alward* v. *Johnson,* 282 U. S. 509, the Court sustained an ad valorem tax on property used in carrying the mails, but again drew the distinction between such a tax and a levy directly on the government taxation itself, pointing out that had the tax been levied on the contract of carriage it could not have been sustained. The Court says:

> "There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely."

Indian Motor Cycle Co. v. *United States,* 283 U. S. 570, involved an excise tax on the sale of motorcycles to a State governmental agency. The Court holds that the sale and purchase is a single transaction in which the purchaser is an essential participant. Without his participation there could be no sale. Hence the tax was held to be laid directly on a contract by the State, and even though assessed against the other party to the contract was invalid.

For similar reasons, the Court in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, held invalid an excise tax by the State of Mississippi as applied to gasoline sold to the United States Government, even though the tax was assessed against the seller.

Graves v. *Texas Co.,* 298 U. S. 393, was the case of an injunction against the collection of a State tax on the withdrawal from storage of gasoline sold the United States.

The Court held the withdrawal from storage to be an integral part of the sale and hence the tax could not be collected. The Court says:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons."

In *Liggett & Myers Tobacco Co.* v. *United States*, 299 U. S. 383, the Court sustained a tax on the manufacture of tobacco sold the State of Massachusetts, but again points out that had the tax been levied directly upon the sale to the State of Massachusetts it would have been a tax upon a State transaction and invalid.

James v. *Dravo Contracting Co.*, 302 U. S. 134, dealt with a claim of an independent contractor that a gross income tax could not be levied by a State on income derived from a government contract. The claim was denied by a majority of the Court; but throughout the exhaustive review of prior decisions the Court maintains always the distinction between such a gross income tax on the one hand, and on the other a direct excise levy on the government contract itself. The Court points out that in the case before it *"the tax is not laid upon the contract of the Government"*. Earnings of the contractor follow from his work, not from his contract. The Government has no further concern with the contract after the execution of the contract. What the contractor makes is of no consequence to the Government "so long as his contract and its execution are not interfered with". "The contract is the means employed for carrying into execution the powers of the Government, *and the contract alone*, and not the contractor, is exempt from taxation or other interference by the State Government."

Helvering v. *Mountain Producers Corp.*, decided March 7, 1938, 82 Adv. Op. 607, 58 Sup. Ct. 623, is the latest expression from this Court. It again sustains the distinction here pressed. The claim of a lessee of State oil lands that income made from the leased lands was immune from taxation was denied; the Court overruling *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado, Oil & Gas Co.*, 285 U. S. 393. In sustaining the tax, however, the Court specifically points out that "the tax is not laid upon the leases as such". The Court also points out that it is dealing with a claim of immunity "sought by a private person for his property or his gains".

From the foregoing review of decisions in this Court it is clear that the Court has consistently maintained the position that a State itself may claim immunity from Federal taxation levied directly and immediately on State contracts or transactions exercised in a government function. Nothing in the later cases impairs in any way this proposition. On the contrary, each of the later cases emphasize the existence of such immunity. The application of the proposition here is perfectly plain. The State itself is claiming the immunity, and the tax levied is immediately upon the contract or license issued by the State with respect to which the tax is levied. It is believed there is no authority for sustaining a tax under these circumstances.

Furthermore, viewed from a practical economic standpoint, the record now before the Court shows clearly that the impact of this tax is directly against State funds. The tickets issued by the two State institutions bore upon their face a purported division of the amount collected between admission and tax, this being required in order to avoid possible criminal liability, but the ticket itself stated that the institution denied its liability for such tax and that the whole amount was intended to be the price of admission unless the State agency failed to sustain its position that a tax

could not be legitimately collected. Three of these tickets are shown in the record, and the figures there given make it perfectly plain that if the tax is enforced it will, from an economic standpoint, fall directly on State funds. On page 289 of the Record is shown one of the tickets. The amount collected from the purchaser under the ticket was $1.50. It is divided, $1.36 admission and .14 tax. On page 345 is shown another ticket where the price was the same and the division was the same.

On page 344 is shown a third ticket. The total amount collected under that ticket was $2.25. Its division is $2.04 admission and .21 tax.

It is entirely obvious that these transactions actually represent sales of tickets at $1.50 and $2.25, respectively. It can not be rationally supposed that had there been no claim of taxation two of the tickets would have sold for $1.36 and the other would have sold for $2.04. Common sense repudiates any such idea just as it was repudiated by the Circuit Court of Appeals (R. 433).

Finally, the levy is further void because it seeks to impose a liability upon a State agency as a collecting agency for the Federal government.

The decision of the Supreme Court of the United States in *Kentucky* v. *Dennison,* 24 How. 66, is here in point. It dealt with an act of Congress requiring the return of fugitives and provided that "it shall be the duty of the executive" of the State to cause the arrest and delivery of the fugitive. The Court says:

> "• • • Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if

it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state.

"It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing that in using this word 'duty' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over state officers not warranted by the Constitution."

PART TWO.

Procedural Questions.

The application for writ of certiorari raises three procedural questions. They relate:

First, that respondent has no standing to contest the validity of the penalty assessed herein;

Second, the contention that R. S. 3224 prevents the maintenance of a suit for injunction; and,

Third, the contention that the Collector originally sued, Mr. W. E. Page, having resigned while this case was pending in the Circuit Court of Appeals, the case thereupon became moot and the Court erred in permitting his successor to be substituted as a party.

We will consider these specifications in the order indicated:

1.

We contend that the facts in this record show that the respondent has collected no taxes for the Federal Government. We further contend that if its conduct can, by any

stretch of the imagination, be considered acting as agent for the Federal Government, it, as pointed out by the Circuit Court of Appeals, "did so under coercion brought about by the fear of being mistaken in its expressed opinion that it could not be required to collect taxes for the Federal Government and that no taxes were due." The facts are these:

The officials of the State of Georgia, having charge of its institutions of higher education, reached the definite conclusion that the Federal Amusements Taxes could not be constitutionally applied to the admissions to athletic contests held by these institutions. This conclusion is sustained, we believe, by the discussion in the first part of this brief. The fact that it has been sustained by both of the lower courts indicates, to say the least, that it is a view that may reasonably be held. In such a situation it was obviously the duty of the State officials to raise this constitutional question in an orderly and legal manner for determination by the appropriate courts.

As is hereinafter discussed in detail, respondent endeavored to raise the question for a prior period by collecting the admissions tax and paying it to the Treasury Department and filing claim for refund. Whereupon, the Treasury Department ruled that one who had collected a tax imposed on another could not proceed by claim for refund.

The State Officials then recognized the rule that one who voluntarily collects taxes for the Federal Government and who as a result thereof has in his hands funds in which he has no interest but which were collected for the Federal Government could not simply appropriate these funds or refuse to pay them over. They necessarily recognized also that if they voluntarily collected funds as taxes and paid them over to the Government they would be in the same position and they would have no standing for their recovery.

On the other hand they were faced with the fact that the Federal Statutes, if applicable to State institutions, carried with them grave criminal liability if the statutes were entirely disregarded. U. S. C. A. Title 26, Section 958 (b) (44 Stat. 116), provides that any person required to collect the tax involved who wilfully endeavors to defeat the tax or the payment thereof shall in addition to other penalties be guilty of a felony and fined not more than Ten Thousand ($10,000.00) Dollars or imprisoned for not more than five years, or both.

U. S. C. A., Title 26, Section 942 (44 Stat. 92), provides that "the price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold, shall be conspicuously and indelibly printed, stamped or written on the face or the back" of the ticket. A violation of this requirement is a misdemeanor.

Treasury Regulations issued pursuant to these statutes (Regulations 42, Article 29) require that "the established price" and the "tax paid" shall be separately stated on the ticket. To have entirely ignored these provisions would have exposed the agents of respondent to grave criminal liability had it ultimately proved that respondent's position as to the constitutional questions involved could not be sustained.

One of the fundamental grounds for permitting a resort to equity to question the validity or application of statutory requirements is that such statutes carry with them grave criminal penalties to which a party in good faith seeking to raise the question of the validity or application of the statutes ought not to be exposed as a condition of contesting the matter. See, for example:

Ex parte Young, 209 U. S. 123;
Oklahoma Operating Co. v. *Love*, 252 U. S. 335;
Sou. Bell Tel. & Tel. Co. v. *Calhoun*, 287 Fed. 383.

This principle is, we believe, applicable with special force to State Officials in the position of the governing authorities of respondent in this case. The plan adopted was to put on the face of the ticket a statement dividing the amount collected into an "established price" and "tax" but to add upon each ticket a statement explaining the position of respondent in the following language:

> "The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admissions tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is *itself* liable for the tax." (Italics ours.) (R. 345.)

The same notice, except for the name, School of Technology, appeared upon each ticket sold by the School of Technology (R. 191, 200, 290). This action was taken solely to protect the personnel of respondent from criminal prosecution (R. 196). The meaning of the language, we believe, is perfectly plain. It says without equivocation that respondent denies that any tax is due and that it is not undertaking to collect any tax; that the division stated on the front of the ticket is merely a formal requirement to comply with Treasury Regulations; but that respondent claimed and intended to retain the whole amount as the price of admission, except in one contingency only, namely: "Unless it is finally determined that the University is *itself* liable for the tax."

The Circuit Court of Appeals has in an unanswerable statement destroyed the contention that this conduct of respondent amounted to such voluntary collection of a tax for

the Federal Government as to bar it from relief. We quote from 81 F. (2d) 580, as follows:

> "The conduct of law-abiding citizens, relying upon constitutional rights but at the same time giving respectful though unwilling obedience to an Act of Congress believed to be inapplicable or unconstitutional, should not be distorted into a voluntary assent to the very application of the statute which is being protested against and emphatically challenged."

Judge Hutchinson dissented from other positions taken by the Court but expressed no disagreement with this proposition.

The Court further says:

> "The only other recourse, except the one followed by appellant, was to disregard the law as construed by administrative officers, and to fail or refuse to comply with it and regulations promulgated thereunder by the Commissioner of Internal Revenue. This would have involved financial hazards and risks of criminal prosecutions which no prudent, law-abiding citizen should be required to incur."

And further:

> "The course taken by appellant seems to us most appropriate. The money was collected by the respective athletic departments under an agreement with the purchasers that, if no tax was due by the University or School of Technology, the amounts so collected should be added to the price of admission and retained by the appellant. There was nothing unfair or illegal about such an agreement. It was one of which the United States could not reasonably complain. If the tax was due by appellant or it was legally required to collect the same, it is the duty of the collecting agent to pay it over; if the admissions were immune from federal taxation, there was no valid agency and certainly no obligation to pay anything over to the appellee. We find noth-

ing in the conduct of the Board of Regents to estop it from standing upon its constitutional rights and asserting the invalidity or inapplicability of the alleged tax."

2.

R. S. 3224 Does Not Prevent Equitable Relief.

It is definitely settled that R. S. 3224 (U. S. C. A., Title 26, Section 154) is merely declaratory of the prior rule that courts will not entertain a suit to restrain the collection of a tax upon the sole ground of its invalidity or the unconstitutionality of the tax statutes. The rule is not, however, absolute and has no application in exceptional and extraordinary cases where there is an absence of a plain, adequate and complete remedy at law. It is not necessary to elaborate this statement. We need only refer to the following:

Miller v. *Standard Nut Margarine Co.*, 284 U. S. 498;
Hill v. *Wallace*, 259 U. S. 44;
Brushaber v. *U. P. Ry.*, 240 U. S. 1;
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 442;
Rickert Rice Mills v. *Fontenot*, 297 U. S. 110;
Wilson v. *Ill. Sou. Ry. Co.*, 263 U. S. 574.

All cases in which relief has been denied will, upon examination, be found to be instances in which no showing was made that there was no adequate remedy available except on the equity side of the court. The inquiry therefore in any case is whether the party contesting the tax could obtain reasonably adequate protection in raising the contention otherwise than by resorting to equity. If so, injunctive relief is barred; if not, equity will take jurisdiction.

In the present case there are the following exceptional and extraordinary circumstances which make a resort to equity proper, namely:

(a) The effort here is to impose a penalty on a sovereign State and to seize funds belonging to the State;

(b) The assessments here were not against respondent but were levied on funds held by respondent for the State of Georgia. Hence, if respondent had paid the assessments it would have had no standing to seek a refund.

(c) R.S. 3224 does not apply where penalties, as distinguished from taxes, are involved

(d) Respondent could not have sought a remedy by collecting a tax, paying it over to the Government and seeking a refund because in that event its acquiescence in acting as a collecting agency would have barred its rights.

(e) Further, respondent could not have attempted that procedure by paying from its own funds the equivalent of the tax because the tax is not laid against it but against the patrons. Only a taxpayer can sue for refund.

(f) Even if respondent could have secured a return of funds in this way, it would not thereby have been accorded an adequate remedy because it would have imposed on it the burden of acting as a Federal collecting agency, which burden cannot be imposed upon a State without its assent.

(g) Also, such procedure would not accord an adequate remedy even if it could be followed because it would impose upon respondent an obligation to collect from patrons alleged taxes not in fact due the Federal Government. State officials should be relieved of such inequitable requirements.

(h) The State is entitled to a remedy by injunction which will relieve its funds from liens and relieve it of a multiplicity of suits.

A discussion of the circumstances above enumerated will be taken up in the order shown.

A. Effort Here Is to Impose a Penalty on Sovereign State and to Seize Funds Belonging to It

That the effort to collect a penalty from a sovereign state is such an exceptional and extraordinary circumstance as justifies a proceeding in equity to determine the validity of the tax as applied to the State is shown by the decisions of this court in *Ohio* v. *Helvering,* 292 U. S. 360, and *Florida* v. *Mellon,* 273 U. S. 12. In the former, the State of Ohio brought a motion in this Court for leave to file a Bill of Complaint against the Commissioner of Internal Revenue and several Collectors of Internal Revenue, the State seeking to enjoin the enforcement against it of a Federal tax Statute. The Bill alleged, as stated by the court, "that the circumstances of the case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign State; and it, therefore, is contended that the equity power of the court is properly invoked. * * *"

This Court, speaking through Mr. Justice Sutherland, and necessarily upholding the contention that the circumstances were exceptional, proceeded at once to the fundamental question involved, saying: "Putting aside various preliminary questions raised by defendants * * * we pass at once to the fundamental question involved in the State's challenge to the validity of the tax."

While the court reached the conclusion that the State was not immune from the tax involved, it nevertheless placed its

efusal to grant the motion by ruling on the merits of the uestion and thereby approved the procedure by injunction.

Likewise, in *Florida* v. *Mellon, supra,* the State of Florida y motion sought to file a bill in this Court to enjoin the ecretary of the Treasury and the Commissioner of Internal evenue from attempting to collect Federal Inheritance axes in Florida. The official report of the case shows that lthough Section 3224 of the Revised Statutes was urged s a bar to the proceeding, this Court ignored the suggestion nd proceeded to uphold the constitutionality of the Estate ax Act as a basis for denying leave to file the Bill.

Following the decision in *Ohio* v. *Helvering* is the case of ennsylvania v. *Fix, Collector,* 7 Fed. Sup. 729. This, also, as a suit by a State, Pennsylvania, against the Collector of nternal Revenue to restrain the collection of the alcohol ax in connection with the operation by the state of a number f retail liquor stores. The Collector contended that the ction was prohibited by Revised Statutes 3224. The Dis-ict Court, however, held:

> "The plaintiff contends that Section 3224, R.S., * * * forbidding suits to restrain the collection of a tax applies to this case, and that this court is without jurisdiction. This is deserving of some discussion. * * *
>
> "It has been held by the Supreme Court of the United States that Section 3224, R.S., does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provision inapplicable. * * *
>
> *"The circumstances of this case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign state."* (Italics ours.)

The above rulings are directly applicable to the present tuation.

B. Assessments Here Not Against Respondent, But Warrants for Distraint Levied on Funds Held by Respondent for State of Georgia. Hence, if Respondent Had Paid Assessments it Would Have no Standing to Seek a Refund.

The joint assessments here involved were made against the following:

Georgia Tech Athletic Association, Georgia Tech Athletic Association, Inc., Board of Control of Georgia Tech Athletic Association, Dr. M. L. Brittain, Dr. W. V. Skiles, Dr. J. B. Crenshaw, Dr. Gilbert Boggs, Professor Floyd Field, Dr. A. H. Armstrong, George W. McCarty, Robert T. Jones, Jr., Jack Phillips, D. Kalkhurst, W. N. Glenn, together with University of Georgia Department of Athletics, Charles E. Martin, Trustee, and University of Georgia Athletic Association (R. 349-350).

Levies by the Collector, under such assessments, were made on accounts, respectively, in the First National Bank of Atlanta and the Citizens & Southern National Bank of Athens (R. 365, 375). These accounts, though carried for convenience in the names of "Charles Martin, Trustee," and "Georgia Tech Athletic Association," were the property of respondent (R. 156, 381, 382).

In explanation of this assertion, the account in the name of "Charles E. Martin, as Trustee," which was levied upon, was held by him as Trustee for the Regents of the University System of Georgia (R. 195), Martin being an employee of the Department of Athletics of the University of Georgia at Athens (R. 191). The account in the name of "Georgia Tech Athletic Association Tax Account" (R. 375, 376), was also the property of the Regents, this Association being a mere unincorporated department of the School of Technology (R. 224, 225, 201, 219).

In further explanation of this assertion, it has been noted in Part One of this brief (*supra,* p. 8) that under the Act of the Georgia Legislature in 1931 creating the Regents of the University System of Georgia, it was provided that all moneys coming into the hands of the Board from any source shall be held and used for the particular institution, and that the Act of 1935, defining the status of the Regents, declared all proceeds of athletic contests to be under the control of respondent, whether exercised directly or through athletic associations or departments.

R. S. 3224 is, moreover, applicable only in cases where the Collector is seeking to collect the tax against the person against whom the primary tax liability exists or against whom the assessment is made. It has no application where, as in the present case, the appellant is not the "taxpayer"—person against whom the assessment was made.

> "Section 3224, R. S. * * * that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,' *applies to taxpayers only,* and who, thus deprived of one remedy, are given another by * * * action to recover after taxes paid and repayment denied by the Commissioner. * * * The revenue laws are a code or system in regulation of tax assessment and collection. *They relate to taxpayers, and not to nontaxpayers.* The latter are without their scope. *No procedure is prescribed for nontaxpayers, and no attempt is made to annul any of their rights and remedies in due course of law.* With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue laws. *The instant suit is not to restrain assessment or collection of taxes of Wise, but is to enjoin trespass upon property of plaintiff, and against whom no assessment has been made, and of whom no collection is sought.* * * * *This presents a widely different case than that wherein the person assessed, or whose property is assessed, seeks to restrain assessment or collec-*

tion * * *." (Italics ours.) *Long* v. *Rasmussen*, 281 Fed. 236.

An injunction was accordingly granted in the cited case. In *Hubbard Investment Company* v. *Brast*, 59 F. (2d) 709 (4 C. C. A.), the court said of Revised Statutes 3224:

> "It has no application to a suit instituted, not to restrain the assessment or collection of a tax, but the sale of property which does not belong to the taxpayer and is not subject to distraint and sale for taxes assessed against him. * * * If, therefore, this were a case where property equitably belonging to one person were being sold in satisfaction of taxes assessed against another, the statute relied upon would afford no reason for refusing relief."

The same ruling was made in the case of *Trinacia Real Estate Co.* v. *Clarke*, 34 F. (2d) 325, as follows:

> "Section 3224, R. S., does not prevent the granting of an injunction against a sale under distraint proceedings of property owned by a person other than a taxpayer."

To the same effect are:

Livingston v. *Becker*, 40 F. (2d) 673, and
Lion Coal Co. v. *Anderson, Collector*, 62 F. (2d) 325, 328.

The reason why an injunction is proper under such circumstances is found in the law and the rulings that the person against whom the assessment is made is given another remedy in lieu of injunction proceedings, namely: by claim for refund. The taxpayer is the only person who by claim for refund can contest the legality of the tax after paying the same, and the only way in which any other person can proceed is by injunction.

The ruling of the courts referred to, holding that it is the right of a *taxpayer* only to proceed by claim for refund, is typified by the decision in the case of *Shannopin Country Club* v. *Heiner,* 2 F. (2d) 293, involving an action by a club to recover admission dues collected by it from its members and paid over to the Treasury Department:

> "The revenue laws of the United States, under which this tax was assessed and collected by the plaintiff, impose this tax upon the members, and not upon the club itself. * * * Under this law, there is no primary money liability upon plaintiff to pay this tax. It had no burden other than acting as collecting agent for the government in collecting the amount of taxes imposed * * *. The plaintiff itself has paid no part of the taxes which it is now seeking to recover, and if it were permitted to recover judgment in this action, it would not in our opinion bar another action by the members themselves, who are the real parties in interest. If the taxes involved in the plaintiff's statement of claim were illegally assessed and collected from the members of the plaintiff corporation, they are the parties injured, and are the ones entitled to recover."

The same conclusion was reached in the case of *U. P. Ry.* v. *Bowers,* 33 F. (2d) 102 (2 C. C. A.), where the Railroad Company had, pursuant to provisions in its bonds, deducted a tax from the interest payable and paid such tax to the Treasury Department. Thereupon, it filed a claim for refund, and subsequently a suit to recover the tax. In denying the refund, on the ground that the Company was not the "taxpayer", the court said:

> "Subdivision (c) requires a return of the amount so withheld and makes the corporation 'liable for such tax;' * * * But in no event can the obligor be regarded as 'the taxpayer,' though he is 'liable for such tax.'"

This rule is concisely stated in *LaFayette Worsted Company* v. *Page*, 6 F. (2d) 399, 400, as follows:

> "The *person assessed* must pay it and bring his action in the courts to recover it back." (Italics ours.)

The same ruling was made in *Wourhack* v. *Becker*, 55 F. (2d) 840, certiorari denied 286 U. S. 548 (52 S. Ct. 501), where the former president of a corporation paid taxes assessed against the corporation and sued to recover same, the Eighth Circuit Court of Appeals ruling that he could not recover, not being the "taxpayer" assessed, but having voluntarily paid a tax which the law would not have compelled him to pay, had he contested the same before payment.

From these decisions it clearly appears that the only person who can, after paying an amount *as a tax*, thereafter by claim for refund and suit contest the legality of the collection of the amount paid by him is the person against whom the tax is assessed, namely, the taxpayer. Any person, other than the person primarily liable for the tax, who pays the tax due from another is considered as making a voluntary payment and cannot thereafter contest or have adjudicated the question whether or not the amount paid to cover the third person's tax liability was legal or proper.

In cases such as *Alliance Country Club* v. *U. S.*, 62 Ct. Claims 579; *Congressional Country Club* v. *U. S.*, 44 F. (2d) 266; *Masonic Country Club* v. *Holden*, 18 F. (2d) 553, which were actions to recover tax on dues, no issue was raised as to the propriety of the procedure.

In *Bunker Hill Country Club* v. *U. S.*, 9 Fed. (Supp.) 52, where the club had collected the tax the Court of Claims held that "the dues and initiation fees in question were

taxable and that as plaintiff collected them it was liable for the tax."

The case of *Builders Club of Chicago* v. *U. S.*, 14 Fed. Supp. 1020 (Court of Claims), is the only case in which a different conclusion has been reached. There the Court of Claims sustained the propriety of the remedy by a club by way of suit for recovery of taxes on dues collected by it, although the Treasury Department in that case contended that the procedure was improper and that, not being the taxpayer, procedure by claim for refund was not open to the club.

The only question in respect to this circumstance, therefore, is whether or not any *"tax"* is due by respondent. Is respondent the "taxpayer" against whom the alleged assessment was made? The answer to this, of course, is the assessment itself which is against the persons above mentioned (*supra*, p. 46).

Respondent does not claim that the point herein made as to the propriety of the procedure adopted by it relieves it from sustaining its position on the merits. While, of course, respondent's funds ought not to be seized under assessments issued against others, nevertheless if respondent was, by reason of its refusal to collect the tax, obligated to pay to the collector a penalty in the exact equivalent amount, it would have no equitable standing in court. Hence, we concede that the immediate point as to procedure nevertheless leaves on us the burden of sustaining our position on the merits. Thus, in *U. P. Ry.* v. *Bowers*, *supra*, dealing with the withholding provisions of the Revenue Act of 1931, the Second Circuit, although ruling that the Obligor of the bonds was not the taxpayer, the court said: "It made the obligor 'liable for such tax' only because of his promise to the Obligee * * *. The government could have enforced that promise at common law or in equity * * *."

C. R. S. 3224, Does Not Apply Where Penalties Are Involved.

The assessment above referred to was, moreover, for a penalty, punitive in nature, under the provisions of Section 1114 (d) of the Revenue Act of 1926, which provides:

> "Any person who wilfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by Titles IV, V, VI, VII, VIII, and IX, or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be *liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over,* to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of Section 3176 of the Revised Statutes, as amended. * * * (Title 26, U. S. C. A. Sec. 958 (c). (Italics ours.)

This is demonstrated by the following. As observed by the Circuit Court of Appeals in its ruling on the motion to dismiss in this case, the return "in this case by the Commissioner was evidently made under Section 3176 of Revised Statutes as amended by Section 619 (d) of the Revenue Act of 1928." 81 F. (2d) 581. This provision of the Revised Statutes authorizes the Collector, in the event a person fails to make a return required by law, to "make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise." This section likewise provides that "The Commissioner of Internal Revenue shall determine and assess all taxes * * * as to which returns or lists are so made under the provisions of this section." As elsewhere stated, the Deputy Collector actually made returns (R. 352 thru 356).

Now, what was it that was returned by the Deputy Collector as aforesaid? The admission tax is imposed upon the purchaser of the ticket:

> "There shall be levied, assessed, collected and paid —a tax of 1 cent for each 10 cents * * * to be paid by the person paying for such admission." Section 500 (a), Revenue Act of 1926, as amended by Section 411 (a) of Revenue Act of 1928 and by Section 711 (a) of Revenue Act of 1932. (Title 26, U. S. C. A., Sec. 940.)

Certainly the return was not being made for purchasers of tickets of admission.

Section 502 of the said Act requires that:

> "Every person receiving any payments for such admission * * * shall collect the amount of the tax * * * from the person making such payments." (Title 26, U. S. C. A., Sec. 955 (a).)

It also provides that:

> "Such persons shall make returns under oath, in duplicate, and pay the taxes so collected to the Collector of the District in which the principal office or place of business is located." (Title 26, U. S. C. A., 956.)

Thus it is seen that the tax is imposed on the patron. If, however, the person required by law to collect the tax refuses or fails to collect the tax, thereupon such person becomes subject to a penalty in the amount of the tax which he has refused to collect.

Section 1114 of the Revenue Act of 1926 which provides for fines and imprisonment for failure or refusal to collect or pay over the admission tax, imposes an additional penalty in Sub-paragraph (d) thereof in the amount of the tax which has not been collected.

While the assessment here does not show the nature of the exaction, it must be assumed that it was under the provisions of Section 1114 (d), as that is the only provision under which an assessment can be made for failure to collect or pay the admission tax. Thus, it was this penalty which is represented in the assessment made by the Commissioner of Internal Revenue.

That the amount so assessed is a penalty seems clear enough from reading of the Statute itself as it is imposed on those who refuse to collect. Likewise, in the Admission Tax Regulations (No. 43) of the Treasury Department, Chapter Ten thereof, dealing with penalties, lists this section along with other penalties.

In this connection, of course, penalties can not be collected by distraint, even from the person assessed. *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. Nor can penalties which have been paid be recovered through claim for refund and suit. *Fontenot* v. *Accardo,* 278 Fed. 871 (C. C. A. 5th).

In the case of *Lipke* v. *Lederer, supra,* this Court makes the following observations in dealing with the provisions of the Prohibition Act:

> "The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide for the support of the Government,' the function of a penalty clearly involves the 'idea of punishment for infraction of the law,' and that a condition of its imposition is notice and hearing. * * * And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity.' "

Certain it is that if penalties can not be collected from the person against whom assessed, it must necessarily follow that they can not be collected by distraint from others against whom the assessments were not made.

D. Respondent Could Not Have Sought Remedy by Collecting Tax, Paying it Over to Government and Seeking Refund Because in That Event its Acquiescence in Acting as Collecting Agency Would Have Barred its Rights.

In considering this circumstance it is necessary to refer to the history of the controversy between respondent and the Federal Government with respect to admissions taxes.

Prior to the institution of this suit and for a period (in 1932) not here involved, respondent collected admissions taxes through one of its branches aforesaid and made a return to the Collector of Internal Revenue in Atlanta, Georgia, and paid the tax (R. 351, 352). Thereafter, it filed a claim for refund setting up the unconstitutionality of the Federal Admissions Tax Act as applied to it and sought a refund of the amounts paid into the Treasury Department (R. 320-322). This claim for refund was rejected by the Commissioner of Internal Revenue on the ground that since respondent was not the taxpayer and had acted merely as a collecting agency for the Federal Government, the remedy by claim for refund was not available to it (R. 324). In rejecting the claim solely on this ground, the Commissioner stated:

> "Thus the tax does not fall on the University or the Athletic Association but upon the persons admitted to the athletic events and the University merely acts as collecting agency in collecting the tax due and turning it over to the Collector of Internal Revenue. The admission charges and the free and complementary admissions to the athletic contests of the Georgia Tech Athletic Association are therefore properly subject to tax. *The evidence on file shows that the tax claimed in refund was collected from the persons admitted to the Contests and was not paid from the funds of the Association or the University*" (R. 325).

Respondent, having collected the taxes involved in said claim for refund (that is, having consented to act as a collecting agency) and therefore not being the "taxpayer", recognized the correctness of this ruling of the Commissioner of Internal Revenue.

Respondent then refused to collect any further taxes and simply, for the purpose of protecting its personnel from criminal prosecution (R. 196), made the notation on each of its tickets of admission hereinabove described. The assessment and levies above described followed this action on the part of respondent.

The Treasury Department, contending that respondent has collected the admission tax, now takes the position that the remedy by injunction is not open to respondent and it is asserted in the application for certiorari that "The Circuit Court of Appeals erred—in holding that respondent had standing to contest the validity of the tax." Thus has the Treasury Department consistently ruled that the validity of the tax cannot be challenged by one who has collected the tax.

The case of *U. S.* v. *First Capitol National Bank of Iowa*, 89 F. (2d) 116 (C. C. A. 8th), moreover, clearly shows the impossibility of questioning the constitutionality of the Act involved, by one who has collected the tax.

There the University of Iowa actually collected the admissions tax and deposited it in the Bank. The United States brought suit against the bank to recover, under the provisions of Sec. 1114 (e) (f) of the Revenue Act of 1926 (U. S. C. A., Title 26, Sec. 1610) for the amount which the bank had refused to surrender upon the levy. The Eighth Circuit Court of Appeals, placing its decision solely on the ground that the State University *had consented* to act as a collecting agency for the United States and *had collected* the tax, held that the tax money belonged to the United States, and said:

"The Federal tax so collected was deposited by the board in control in defendant bank * * *. When the board in control, with the consent of the University of the State of Iowa, undertook to act and did act as collecting agent for the United States in the collection of the federal admission tax, its relationship with the University of the State of Iowa with respect to the federal tax collected became of secondary importance. It was governed, while so acting for the United States, by the Statutes of the United States and the regulations issued thereunder. * * *

"The State University, *having acquiesced in the collection of the admission taxes* for the United States by the board in control, may not in this action against the bank assert ownership in itself of the federal taxes so collected."

Consequently the ruling of the trial court "that the validity of the federal tax cannot be litigated by the defendants in the present action," was affirmed by the Eighth Circuit.

The Iowa case clearly demonstrates the utter futility of the procedure of collecting a tax and then seeking to contest the validity of the tax by way of refund. This is necessarily true, as a State government or State university may consent to act as a collection agency for the United States (as did the University of Iowa by collecting the tax) and if it does, the money collected belongs to the United States.

E. Respondent Could Not Have Attempted Procedure by Paying the Amount Assessed and Seeking Refund, Because Tax is Laid Against Patrons.

Neither could respondent have paid with its own funds the amount of the admissions tax to the Treasury Department and sought its recovery by claim for refund. This situation was due to the fact that the admissions tax is laid, not on the vendor of the ticket of admission, but on the purchaser. (26 U. S. C. A., Sec. 940). We have heretofore

pointed out that only the "taxpayer" can proceed by claim for refund.

As above pointed out, moreover, no tax was collected for the period here involved, and, as further pointed out, for the period in 1932, when the tax was collected and paid to the Treasury Department, respondent's claim for refund was met with the ruling that only the taxpayer could so proceed.

F. Even if Respondent Could Have Secured a Return of Funds in This Way, it Would Not Thereby Have Been Accorded Adequate Remedy, Because it Would Have Imposed on it the Burden of Acting as Federal Collecting Agency Which Burden Cannot be Imposed Upon a State Without its Assent.

In Part One of this brief we have pointed out that it is a burden upon a State to be required to collect taxes for the Federal Government; consequently, if it did have open to it the remedy of collecting an illegal tax, paying it to the Government and then filing claim for refund, there would be no way for the State to relieve itself of the burden placed on it of collecting the tax.

G. Procedure by Claim for Refund if Available Would Not Accord Adequate Remedy Because it Would Impose on Respondent the Obligation to Collect from Patrons Taxes Not in Fact Due Federal Government. State Officials Should be Relieved of Such Inequitable Requirement.

For the reason stated under sub-division "f" above, the remedy by claim for refund, if available, would not be adequate. State officials should not be required to collect

an illegal tax as a condition precedent to the opportunity to contest the validity of the tax.

H. State is Entitled to Remedy to Relieve its Funds from Liens and Relieve it of a Multiplicity of Suits.

The Collector filed notices of lien under provisions of Revised Statutes 3186 (Title 26, U. S. C. A., Section 1560, 1561). As required by this section of the revised statutes, the Collector filed the lien notices with the Clerk of Superior Court of Clarke County, Georgia, and with the Clerk of the District Court wherein Clarke County is located (R. 257). In this connection, Revised Statutes 3186 provides that, where there is a failure or neglect to pay the tax demanded, the tax will become a lien until it is satisfied. It further provides that to be effective against subsequent purchasers, mortgagees, or judgment creditors, notice of lien must be filed in accordance with the law of the State where the property is situated or in the office of the Clerk of the District Court for the district. There is, therefore, this additional ground for equitable remedy herein, in that the filing of the lien placed a cloud on the title of the property of respondent held by it as an agency of the State of Georgia.

In like manner, it would be utterly impossible to recover all of the admissions penalties in one suit even if they were paid to the Federal Government. This results from the fact that admissions are collected by the respondent approximately ten months (the school year) of each calendar year (R. 10, 381, 385). Indeed, the answer of the Collector herein discloses that there is already pending another suit brought by respondent with respect to the same tax for a period in 1933 (R. 91).

3.

Substitution of Successor Collector Clearly Authorized by Section 11 of the Act of February 13, 1925. (U. S. C. A., Title 28, Section 780.)

Substitution of Marion Allen, the successor Collector, was based on Section 780 of Title 28, of U. S. Code, Annotated, which provides.

> "Where, during the pendency of an action, suit or other proceedings brought by or against an officer of the United States * * * and relating to the present or future discharge of his official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the Court where the action, suit or proceedings is pending, whether the court be one of first instance or an appellate tribunal to permit the case to be continued or maintained by or against the successor. * * *"

On the face of it, this statute was intended to relieve just such difficulty as was presented in the present case. This suit, as hereinbefore recited, presents a history of a long effort on the part of respondent to determine the validity, as applied to it, of the statute herein involved. The resignation of the original Collector, W. E. Page, and the substitution of his successor had no more practical bearing on the conduct of the litigation or the determination of these questions than would the death of an expert on plant pathology in the Department of Agriculture. We were, nevertheless, faced with the application of the representatives of the Government to have the whole litigation treated as a nullity and a new suit required against the new Collector.

We believe it is perfectly clear, in the light of the history of this section, that it was intended to avoid just such a result. In considering its history we must bear in mind that the claim of the Government is predicated on the technical view that a suit to enjoin an officer acting beyond

his authority is personal as to the officer. This, of course, is true, but the history of the present section shows that it was intended to cover just such suits which, while technically personal, are really suits affecting the official conduct of the officer. Indeed, the history of the section leaves no possible doubt on this point. *Bernadin* v. *Butterworth*, 169 U. S. 600, was a suit for a mandamus against the Commissioner of Patents. Pending the suit the Commissioner died and an effort was made to substitute his successor. The Supreme Court held that it could not be done for the same technical reason now advanced by opposing counsel, viz., because a mandamus against an officer who was wrongfully refusing to act was personal as to the officer. It should be noted, therefore, that the *Butterworth* case, a suit in which the substitution was refused, was a suit that was just as much personal to the officer as is the present case against the Collector. To make the foregoing perfectly clear, we quote from *Bernadin* v. *Butterworth*, as follows:

> "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But, no matter out of what fact or relations the duty has grown, what the law required, and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him

> the relator has a clear right. * * * When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And, if a successor in office may be substituted, he may be mulcted in costs for the default of his predecessor without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty, and render the interposition of the court unnecessary. In all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative."

In *ex parte LaPrade*, 289 U. S. 444, the Court says (see p. 457) that this statute was passed to relieve the situation pointed out in *Bernadin* v. *Butterworth*. That is to say, because of the technical rule that a mandamus or an injunction against a public officer acting wrongfully in his official conduct was personal as to him and hence his successor could not be substituted, therefore, the Court says the Congress passed this statute to allow the substitution to be made as against this technical rule.

Substitution was refused in the *LaPrade* case because a State officer was involved and the Court held that the part of Section 780 of Article 28 of the U. S. Code which permitted the substitution of State officers could only be applied where the States had themselves passed statutes consenting to such substitution. But the Court expressly distinguishes this from the case of Federal officers where the power of Congress is plenary and where the consent of Congress for the substitution has been given.

The *LaPrade* case, cited in the application for certiorari herein, therefore, instead of sustaining the position of opposing counsel, is in effect conclusive that the right of substitution exists.

Let us see what a contrary view as to the construction of this statute would lead to. A suit against an officer for mandamus or injunction for wrongful action in the course

of his official duties is personal. This is always true in a technical sense; but no suit is ever brought against such an officer except on the claim that his conduct is unlawful, and if, because of that, the suit was not within the statute as to substitution, there could never be a case that would be within the statute.

It is, therefore, clear that this statute was intended to prevent such travesties on justice as would result in the present case from nullifying everything that has been done on account of the Collector's resignation. It may be well to note that the cases holding that a successor collector cannot be substituted in suits to recover refunds, are not in point because in those cases a common law judgment results and the proper party to be substituted is the administrator or executor of the Collector.

Furthermore, the *LaPrade* case points out that the Court does not mean to hold that "a successor in office who adopts the attitude of his predecessor" could not be substituted, even independently of the statute under consideration. And, as pointed out by Judge Sibley below (R. 432), the successor Collector admitted his intention of proceeding with the assessment herein involved.

Respectfully submitted,

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APPENDIX.

Educators Regard Athletic Contests as Sound Part of Program of Physical Education.

There is a large amount of literature available on this subject. It is, of course, not free from conflicting opinions. Certainly many aspects in the past of intercollegiate athletics have been the subject of criticism. We would be less than frank if we failed to admit that a part of this criticism has been just, although much of it has suffered from the chronic American fault of gross exaggeration.

Anyone really familiar with the developments in this field knows that a large part of the things which have heretofore been the subject of criticism have been either corrected or are on the way to correction. Most of the criticism of intercollegiate sports, either expressed or implied in this case reflects a lack of comprehension of actual current developments in the educational world. As some illustrations of educational thought on this subject, the following are submitted:

In 1934 Drs. Williams and Brownell, both of the Teachers College of Columbia University, published a work entitled "The Administration of Health and Physical Education." Chapter 17, commencing on page 405, deals with the subject "Intramural and Interscholastic Athletics." The chapter begins with a brief reference to the development of such sports as an uncontrolled student activity. On page 405 we quote the following:

> "Slowly school authorities came to the realization that responsible leadership was essential."

From page 406, under the title "The Educational Value of Athletics," we quote the following:

> "In fact many of the desired outcomes of modern athletics are identical in purpose with those of general education. Like other departments of the school program, intramural and interscholastic contests possess inherent qualities which contribute to complete educa-

tion. If personal happiness and service are worthy ideals of education, what better opportunity is provided in the public school for the realization of these outcomes than the happiness derived from participation in athletics—situations fraught with dramatic intensity and adventurous appeal—or the exemplification of true service with which the player submerges personal glorification for the best interests of his group,''

And on page 407 we quote:

''*Athletics a Part of Physical Education.*—Within a few short years the control of athletics has passed from students and spectators to superintendents and principals. Under the guidance of these educational administrators, responsible persons have been employed to protect and develop the educational values of such activities. Most of this leadership has been assumed by teachers of physical education, the majority of whom are experienced and highly skilled technicians who have received their training in one of the numerous professional schools throughout the country. Notwithstanding the occasional example of athletic programs organized and conducted for commercial purposes, or for the amusement of spectators who are educationally disinterested—with the usual attending evils of overemphasis—the administrative principle is established that athletics belong to the school and that they are a part of physical education.

''Acceptance of this policy is evidenced by a regulation of the North Central Association of Colleges and Secondary Schools which reads, 'All athletic competition should grow out of and form an integral part of the physical education program * * *.'''

What is true of interscholastic athletics, as discussed by these writers, is true to a larger extent of intercollegiate athletics, in that responsible faculty control developed earlier in the college field and has become more complete, except, perhaps, for a few colleges which are noted for being

somewhat outlaws in this respect. It should be borne in mind in the present case that the record shows, without contradiction, that the Southeastern Conference, having jurisdiction over intercollegiate contests in this area, has definitely adopted rules requiring faculty control of athletics; also for the regulation of athletics. Both the University of Georgia and the Georgia School of Technology comply with these rules, and faculty control is at both institutions complete.

In 1936 Dr. Williams of Columbia, this time in collaboration with Dr. Hughes of the Teachers College at Columbia, published a work under the title "Athletics in Education." It is a most helpful work for anyone interested in the subject. It should be noted at this point that the Teachers College at Columbia is recognized as the leading school of education in the United States. Its preeminence in original research and study in the field of education has been acquired under the long leadership of Dr. Kilpatrick. Studies on the subject of education, coming from the Teachers College of Columbia, while not necessarily conclusive, can safely be accepted as representing the views of a recognized authority.

We quote from page 56:

> "*Physical Education, an Aspect of Education.*—A transformation within physical education itself is favoring the incorporation of all phases of athletics within the department of physical education and the conduct of the program of physical education from an educational point of view. These changes have been going on rapidly during the last twenty years. They are in part a reflection of the same influences that have been reshaping American education along functional lines and in part an expression of modern psychology and educational philosophy upon it.
>
> "Out of new statements of aim, objectives, methods, principles, and programs, have come more clearly than ever before recognition of (1) the unique, educative values in physical education, (2) its opportunities for wholesome development of young people, and (3) the

contribution of its learned activities to life, its work, and its pleasures."

From page 59 the following statement:

"It would appear, therefore, that physical education provides, through its sports and games, unique educative opportunities in socialization, the setting-up of standards, and the formation of attitudes."

In 1934, at a meeting of the National Collegiate Athletic Association, held in New York, Dean Herbert E. Hawkes of Columbia College gave an address at a meeting of coaches, in which he described their position as part of the faculties of their colleges in the following language:

"Since we agree that the whole boy must be trained, your work is absolutely essential in bringing to the surface in each boy with whom you come in contact the qualities of mind and character that your specialty naturally evokes. Each of you knows what that is. The games of baseball, of basketball, of football, of tennis, each and all have contributions to this training of the whole man. But this is not all. You are each a member of a staff of teachers, of history and chemistry and all of the rest."

Proceedings, National Collegiate Association, 1934, page 95.

In the work entitled "Higher Education in America," by Dr. Raymond A. Kent, President of the University of Louisville, published in 1930, Ch. 19 is devoted to the subject "Physical Education and Athletics." While this book was compiled by Dr. Kent various chapters have been written by others, the particular chapter being by Dr. Foster C. Allen, Director of the Division of Physical Education in the University of Kansas. The whole chapter is interesting. The conclusion reached by the author is the following:

"Modern physical education founded on the primary basis of sports and games is the most effective program of its kind in our universities and colleges today."

Perhaps the nearest approach to an authoritative statement of the views of the educators as a whole that can be found is the report on "Intercollegiate Football," by a Committee of the American Association of University Professors, published as a bulletin of that Association under date of April, 1926, being Vol. 12, No. 4. It is an exhaustive study of the subject up to that time from the standpoint of the advantages and disadvantages of intercollegiate sports as a part of an educational program, with a number of recommendations for improvement. The most important of these recommendations is the extension of faculty control, as it has been extended with both of the institutions now before the court. The report as a whole is overwhelmingly favorable to the position that such intercollegiate sports have high educational value and should be retained as a part of the program of college education. It is too lengthy to quote.

An address by President Ernest M. Hopkins, Dartmouth College, under the title "The Place of Athletics in an Educational Program," is published in the proceedings of the National Collegiate Athletic Association for December, 1925. His address is so convincing that we regret we can quote only briefly from it. It is based upon one fundamental idea which every thoughtful man must recognize, namely—you cannot shut up youthful interests within the bounds of a curriculum of study only. There never has been a time when this has been done and it would be unfortunate if it could be accomplished. No more sound or valuable outlet for student activity has ever been found than intercollegiate athletics and the accompanying intramural athletics which they stimulate and develop. We quote the concluding statements in the address, pages 96-97:

> "Returning, for a moment, to the distinction which I earlier made between the curriculum life of the college and the community life, I wish to reiterate this thought. Sense of such indispensable attributes for community life as the will for cooperation, team play, and the willingness to forget self for advantage of the group, are inculcated largely in the community life of the college, and can be but little inculcated elsewhere.

Character development, moral stamina, those forms of generosity which we call sportsmanship, are produced in the actual life of the college community, and in this the greatest single agency for their production is the institution of intercollegiate athletics.

"The stimulated intellect is, of course, the primary purpose of the college. But is not the man whose intellect has been stimulated doubly valuable to society when he is qualified to become an effective agent in the community in which he lives? As preparation for this, the ideals of the college community have influence beyond reckoning. No agency of the undergraduate life so powerfully binds the college community together nor, on the whole, so advantageously permeates it ideals as do the undergraduate sports. Hence, let us not deny them either the consideration or the credit which is rightfully theirs."

"Athletics *have* a desirable place in the American college!"

As a practical test of whether the theories of the great majority of educators who approve intercollegiate sports are correct we quote from an address by Hon. Newton D. Baker, delivered December, 1919, just after the close of the World War, to the National Collegiate Athletic Association, and printed in the Proceedings of the Association for December of that year. Page 81:

"If it had not been for the college gymnasium and the athletic field, I venture to say that the American Army could not have been officered in any such small space of time, for we needed not only the trained mind and trained muscles of the American youth, but we needed the spirit of fair play. We needed the spirit of teamwork, the spirit of organized games, which has come to be the characteristic of college athletics. We needed all of that, and it was a contribution of inestimable value, and one which in any future emergency that confronts this country we must look to you again to supply."

It is a statement comparable to that of the Duke of Wellington, that the Battle of Waterloo was won on the football fields of Eton and Harrow.

And as another opinion outside of college faculties, as to whether college athletics are really justifying the opinion of those who approve of them as a part of an educational program, we quote from an address by Dr. George J. Fisher, Deputy Chief Executive, Boy Scouts of America, delivered at the December, 1927, meeting of the National Collegiate Athletic Association and reported in its proceedings of December, 1927, as follows:

> "There is no group of men in America, in my judgment, that is doing more in a wholesome way for the youth of America than the group in this Association. All praise to them."

Lastly under this part of the brief we quote from an address of Dr. Charles W. Kennedy of Princeton, and Chairman of its Board of Athletic Control; the quotation being from an address delivered by him to the National Collegiate Athletic Association, December, 1924, and published in its proceedings of that year, page 87:

> "What, then, is this system of college athletics with which we are dealing and what is its true place in the corporate life of a college or a university, I recognize, of course, that it has a value in improving the physique of a growing boy. I recognize that it has a value in affording an outlet for the natural human desire for the playing of games. But the intensity of my faith in college sports is not based on either of these grounds. It is based upon the conviction that college athletics properly supervised and properly developed afford a laboratory training for the development of character such as is not afforded elsewhere in the life of an undergraduate. I am glad to have this opportunity to define my faith."

We believe that a fair summary of current thought among educators on this subject would be about the following:

The very rapid development of intercollegiate contests naturally brought with it a certain number of recognized evils. These have to a large extent been eliminated; responsible faculty control has been established; and adequate machinery is now functioning to preserve the useful character of such contests, to eliminate in the main remaining evils, and to prevent their recurrence. The overwhelming conclusion among educators is that the inherent educational value of such contests, properly controlled, is great and should and will be preserved as a permanent part of the educational program of this country.